2001

Kent F. Fuller v. Zinik Sporting Goods Company : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

KENT F. FULLER, a minor appearing by and through CONNIE J. FULLER, his guardian ad litem,

Plaintiff and Appellant,

vs.

ZINIK SPORTING GOODS COMPANY, a corporation, and THOMAS E. FOLKMAN,

Defendants and Respondents.

Case No. 13905

BRIEF OF APPELLANTS

Appeal from Judgment and Order
Third District Court, Salt Lake County
Honorable Peter F. Leary, Presiding

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NATURE OF THE CASE

This is a civil action brought by plaintiff against defendants for damages arising out of the detention, arrest, incarceration and prosecution of plaintiff by defendants. Plaintiff's contends that he was illegally and without probable cause detained, arrested and charged with and prosecuted for the crime of shoplifting at Zinik's store in Salt Lake City.

DISPOSITION IN LOWER COURT

The matter was tried to a jury and verdicts of No Cause of Action (R. 150-153) were returned on the issues of malicious prosecution, false arrest, and false imprisonment.

Plaintiff filed a Motion for New Trial (R. 145), based upon (1) the refusal of the trial court to grant plaintiff's Motion for Directed Verdict at the close of the evidence on the issue of liability as to false arrest and false imprisonment, and (2) refusal of the trial court to instruct the jury, as requested by plaintiff, that the burden of proof to show reasonable and probable cause for plaintiff's detention and arrest under Sections 77-13-30 and 77-13-32, Utah Code Annotated, as amended 1959, was the burden of defendants. The Motion for New Trial was denied.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a reversal of the Judgment on Verdict entered in this matter and of the Order denying the Motion for New Trial, and requests that the matter be remanded to the Third Judicial District Court, in and for Salt Lake County for a new trial. Plaintiff requests that this Court hold as a matter of law that defendants are liable to plaintiff in damages for false imprisonment and false arrest and that, as to those issues, the sole issue to submit for trial on remand should be that of damages.

STATEMENT OF FACTS

At approximate 2:00 P.M. on a warm afternoon on August 14, 1973, plaintiff came into downtown Salt Lake City on his motorbike (R. 7) for shopping purposes. He parked his vehicle on Main Street and entered the business premises of Zinik Sporting Goods Company. He carried his helmet with him (R. 8), since to leave it with the vehicle is an open invitation to theft. The chin strap was connected, and he carried the helmet with the strap as he proceeded to the rear of the store where the sporting goods were displayed. He was wearing cut-off Levis and a "tank top", which is a type of a slip-on shirt not having sleeves (R. 8, 10).

At the time, there were very few customers in the store, particularly in the sporting goods section, and several clerks were standing around with little to do (R. 23). Plaintiff stopped at a display counter featuring mountain climbing equipment, where he picked up a karabiner (R. 13), and was examining it and other mountain climbing equipment. A karabiner is a light weight object approximately 2½ inches long and 1½ inches wide, shaped and looking like a ½ inch chain link, and having a spring arrangement which permits a portion of the link to open. It is inserted into the eye of metal wedges driven into rocks, and a climber can then tie to or string his rope through the karabiner. The item retails for about $2.00.

One of the store's clerks approached the plaintiff

and, with the karabiner in his hand (R. 14), the plaintiff and the clerk went to another nearby display stand where plaintiff selected a waterbag which his mother had requested that he purchase (R. 17). The two of them then went to the check counter, which was centrally located just slightly to the rear of the center of the store (See Exhibit 1-P, which shows the location of the various store areas and the route of plaintiff while in the store). While making payment for the waterbag plaintiff placed the karabiner in his helmet and put the helmet on the floor against the check counter rather than on the high narrow ledge of the check counter, since helmets are oval and tend to roll around when they are set down (R. 16, 17). The karabiner was placed upon two or three flat packets of photo prints which plaintiff had previously paid for at another business establishment, and which were lying flat in the bottom of the helmet (R. 15, 42). The clerk inquired of plaintiff if there was anything else that he wanted and he answered "Not for awhile", and that he was comparing some things (R. 18). The water bag was then put in a sack, which plaintiff held in his hand.

Plaintiff thereupon picked up his helmet and retraced his route toward the back of the store and went to the same area containing the mountain climbing equipment and a contiguous section of the store containing a display of bows and arrows (R. 19).

In the meantime, defendant Folkman, assistant

manager of the store, had received a phone call from an employee, Richard Bringhurst, that there was a "possible" shoplifter (R. 80, 100) in the store. Folkman came down the elevator from an upstairs office, checked with one of the employees to determine which person they were watching, and walked to the main door at the front entrance to the store (R. 100). The store had no rear entrance available to customers.

After waiting three or four minutes at the main door, Folkman re-traced his steps and approached plaintiff as he was standing in the bow and arrow section looking at a display (R. 101) and stated "Where's the karabiner? Empty your pockets." (R. 102).

Plaintiff held his helmet out towards Folkman (R. 21, 49), but he was required to separately empty each of his pockets. Folkman personally examined plaintiff's rear pockets (R. 102). Thereupon, Folkman looked into the helmet and saw the karabiner, which lay against the sloping edge of the helmet and alongside the film packets. The degree to which the karabiner was visible was the subject of a conflict in the evidence, but there was no question on the part of any witness as to the fact that it was visible (R. 19, 50, 111, 112, 116, 117).

Folkman took the karabiner, made a comment that ". . . that was concealment, . . ." and proceeded to take plaintiff into a back room of the store (R. 102). He made no contact after plaintiff's detention with any of the other store employees, although plaintiff testified

that one of them came by at the time of his detention and made a comment that he had seen plaintiff put the karabiner in his pocket (R. 21, 51, 56). At least one employee did, however, follow them to the back room of the store and stood outside the door (R. 64).

Folkman then proceeded to telephone the police and, after a police officer arrived and the proper formalities were had, Folkman advised plaintiff that he was under arrest (R. 113). Prior thereto, and while the two of them were in the back room, plaintiff explained to Folkman that he intended to purchase the karabiner and inquired as to why he could not pay for it (R. 103). At the time he had approximately $7.00 in his possession, a checking account with a balance of approximately $1,000.00, and his family maintained an account at Zinik's (R. 24, 46).

The police officer, after Folkman had made the formal arrest, forced the plaintiff to stand up against the wall of the rear room, frisked him, and handcuffed his hands behind his back (R. 22). The officer, accompanied by Folkman, led the plaintiff through the store and out the front entrance onto Main Street, where he was placed in a police car and taken to the local jail. He was booked, finger-printed, mugged (photographed), and his possessions were checked (R. 24, 25). He was assured that his motor bike would be removed and placed in safe keeping, but it was allowed to remain on Main Street during the remainder of that day and the

night, until plaintiff recovered it the next morning. Plaintiff was held in jail until 11:00 o'clock that night, at which time his father returned from out-of-town and posted bail (R. 25).

Folkman swore out a complaint in City Court, and left (R. 103, 113). Subsequently, the matter came to trial on the criminal charge of larceny, and Judge Maurice Jones, sitting without a jury, found plaintiff Not Guilty. It further developed that plaintiff had "never done anything of this type in his life" (R. 104), and, on cross-examination, that he had never been arrested before (R. 25).

Subsequent to the city court trial, plaintiff brought action, through his mother as guardian ad litem, since he was only 18 years of age, for false imprisonment, false arrest, and malicious prosecution.

ARGUMENT

I.

THE TRIAL COURT ERRED IN REFUSING TO GRANT PLAINTIFF'S MOTION FOR A DIRECTED VERDICT AS TO LIABILITY FOR HIS DETENTION AND ARREST.

It is the position of plaintiff that under the law and applicable statutes there was no legal basis or reasonable cause for (1) detaining plaintiff in defendant Zin-

ik's store in the first instance, and (2) even if such detention was lawful, there was no legal basis or probable cause for thereafter causing plaintiff to be arrested, placed in jail, and submitted to a criminal charge of larceny. Accordingly, issue is taken with the refusal of the trial court to grant plaintiff's Motion for Directed Verdict (R. 120) on the issue of liability which was made at the conclusion of the evidence taken in the trial.

The analysis of this matter should properly be made into two parts: Whether defendant Folkman was justified in accosting and detaining plaintiff in the first instance and, if so, was he further justified in thereafter detaining plaintiff and causing his arrest and incarceration.

(a) *Defendants did not have reasonable and probable ground to detain plaintiff as a matter of law.*

Section 77-13-30, Utah Code Annotated, as Amended 1957, sets forth the Utah Statutory law pertaining to the detention of persons suspected of shoplifting:

> "A peace officer, or a merchant, a merchant's employee, servant or agent, who has reasonable and probable ground for believing that goods held or displayed for sale by the merchant have been taken by a person with intent to steal may, for the purpose of investigating such unlawful act and attempting to effect a recovery of said goods, detain such person in a reasonable manner for a reasonable length of time."

Whether defendant Folkman had reasonable and probable ground to believe that plaintiff intended to steal the karabiner should be tested by examining the evidence. The full extent of Folkman's information pertaining to the matter involved an inter-office phone call from employee Richard Bringhurst (R. 80, 89), informing him that "We had a possible shoplifter" in the store and ". . . please come down now." Folkman then related that he came down the elevator to the main floor and, in his own words (R. 100) "Checked with one of the employees to see which person it was they were watching. Then I walked to the main door in the front, the entrance to the store."

Folkman then indicated that he watched plaintiff as he was standing in the aisle by the bow and arrow display, while Folkman was still down at the front of the store, —

> ". . . and I gave him about three or four minutes to kind of, you know, make up his mind whether he was going to put it back or buy it, . . ."

The evidence is completely devoid of any other information having been conveyed to Folkman at that point, although someone must have also told him that a karabiner was involved as indicated by his statement made at the time of his subsequent contact with the plaintiff. At any rate, Richard Bringhurst, at the time of the phone call, didn't tell Folkman that the item was in plaintiff's pocket; in fact, Folkman testified that "He didn't even tell me what the item was."

Inasmuch as Folkman went to the front door of the store to observe plaintiff, and since he at that time recognized that plaintiff had the option of ". . . *mak(ing) up his mind whether he was going to put it back or buy it,* . . .", what possible rule of law or reason should dictate that plaintiff be required to make that decision within a period of time consisting of three or four minutes? If store customers don't make a purchase within such a period of time, are they expected to leave the store, notwithstanding that they have been invited into the establishment for business purposes? By his admission, Folkman clearly realized that plaintiff had an option and, by not accosting plaintiff immediately upon stepping off the elevator, it appears clear that Folkman recognized that any detention at that point would have been premature and unauthorized.

What, then, transpired to change the situation after the lapse of three or four minutes? The answer is — nothing. Plaintiff was quietly standing in the area between the bow and arrow display and the mountain climbing equipment counter, and he hadn't made any movement of any kind which would indicate that he planned to move toward the exit of the store. In fact, his position at that time was considerably to the rear of the check counter, also.

Some states, with statutes similar to ours, contain an additional provision covering situations of this type. The Ohio statute (Section 2935.041 Revised Code) set

forth in the case of *Isaiah v. Great A. and P. Tea Company*, 174 NE 2d 128, 86 A.L.R. 2d 430, contains such a provision:

> "Such detention, however, shall not be lawful unless the person to be detained has left the confines of the establishment but is within the immediate vicinity thereof; or, where the establishment is of the self-service type, the person to be detained has passed the cashier's counter."

Although Utah's statute contains no such provision, it is submitted that reasonable minds, considering Folkman's conduct and admissions, would have to agree that, in the absence of any overt action on the part of plaintiff, there was no reasonable ground to accost and detain plaintiff after the lapse of three or four minutes or any other length of time.

In support of the foregoing argument it is well to note that under statutory provisions similar to those in Utah, a person making a detention and/or arrest is held to the objective standard of a reasonable prudent man. Authorities for this principle will be set forth in the next section of the brief. The important thing is that the test is not that of the subjective suspicion in the mind of the store employee. As stated at 47 A.L.R. 3rd, page 1002 —

> ". . . mere suspicion that a person is shoplifting is insufficient to create probable cause for detention under a shoplifting statute, . . ."

A further view of the situation which was evident to defendant Folkman immediately prior to making the detention and arrest reveals that there was a very logical alternative available other than the course which was followed. Folkman admitted on cross examination that the plaintiff entered the store alone and that there was really no need to make the detention and arrest at the time, at the place, and in the manner which he utilized.

Q. The store wasn't overly crowded at around 2:00 o'clock that afternoon with customers?

A. No, sir, it was not.

Q. Apparently there were ample personnel to watch what Kent was doing?

A. That's correct.

Q. And there would have been ample personnel to have waited until he did or didn't go towards the door with this item?

A. That's true.

Q. And you so testified at the criminal trial, didn't you?

A. That's right, there was plenty of people watching him.

Q. He didn't come into the store with a group of boys, did he?

A. No, sir, he did not.

Q. He was all alone?

A. Um-hum.

(R. 107)

Applying an objective standard of a reasonable prudent man, what justification existed for detaining and arresting the plaintiff who was in the act of shopping at a point near the rear of the store — and to the rear of the check-out counter, and who had given no indication of leaving the store with the item involved? Folkman had the alternative of waiting to determine whether the plaintiff was going to purchase the item or put it back on the counter; further, he was blocking the exit to the store and had ample assistance at all times to resolve the matter of whether plaintiff might eventually take any merchandise belonging to defendants.

Plaintiff submits that his initial detention, under the undisputed facts and viewed from the objective standard of a reasonable prudent man, was unreasonable and illegal as a matter of law.

(b) *Defendants did not have reasonable and probable ground to arrest plaintiff and cause his incarceration as a matter of law.*

If it be assumed, arguendo, that Folkman had some reasonable ground for detaining plaintiff in the first instance, it is submitted that no reasoable and probable ground existed for his continued detention, arrest

and incarceration. Our Utah statute pertaining to this aspect of the matter is Section 77-13-32, Utah Code Annotaten, 1957, relating to the liability of one causing a detention or arrest for suspected larceny:

> "A peace officer or a merchant, merchant's employee, servant or agent who causes such detention of a person as provided in Section 77-13-30, or who causes the arrest of a person for larceny of goods held or displayed for sale shall not be criminally or civilly liable where the peace officer, or merchant, merchant's employee, servant or agent has reasonable and probable ground for believing that the person detained or arrested committed larceny of goods held or displayed for sale."

Although Folkman indicated that Bringhurst ". . . didn't even tell me what the item was", he accosted plaintiff and said, "Where's the karabiner? Empty your pockets." (R. 102). After requiring plaintiff to empty his front pockets, Folkman personally felt the back pockets (R. 102), found nothing, and looked into the helmet, which was extended to him. Folkman initially testified that plaintiff lifted the pictures to reveal the karabiner (R. 102), but further inquiry into the matter revealed a considerably different situation. On cross-examination Folkman admitted:

Q. At the criminal trial didn't you state that it was in view but partially hidden on edge?

A. Yes, sir, I did.

* * * * * *

Q. In any event, this karabiner could be seen visibly in the helmet?

A. If you call about one-thirty-second of a whole item showing, yes, sir, it was. . . ."

(R. 111, 112)

Plaintiff's testimony concerning the visibility of the karabiner in the helmet, as given on rebuttal examination, was as follows:

A. Yes. He testified that he could see the karabiner, that it was on edge. He testified in (city) court to that.

Q. Say it again; he testified what?

A. That he could see the karabiner and that it was on edge. He showed the karabiner on edge to the judge, and more than half of it was showing.

Q. Did you see him show this to the judge?

A. Yes, I did.

(R. 116, 117)

At two points in the cross-examination plaintiff responded:

Q. You didn't reach in and bring them out?

A. He (Folkman) just saw right in it without me moving anything.

Q. He looked in and the karabiner was underneath the film in your helmet?

A. No. It had slipped and was on the side against the wall of the helmet.
(R. 50)

* * * * * *

BY MR. LAUCHNOR:

Q. Kent, this karabiner was on edge when Mr. Folkman showed it to the judge, illustrating the way the karabiner was when you lifted the film packages, is that right?

A. When I what?

Q. When you lifted the film packages?

A. I never lifted the film packages.

Q. Who did lift the film packages?

A. Nobody.

Q. Are you saying up at the store nobody ever lifted the film packages from the karabiner?

A. No, I never said anybody did.

Q. Are you saying you didn't?

A. They didn't lift.

Q. And you didn't either?

A. No.

Q. It was up on top?

A. Yes, on its side.

(R. 117)

Whatever version one wishes to accept concerning the degree of visibility of the karabiner in the helmet which plaintiff was carrying by the chin strip, the essential fact remains that a portion of the item was visible under everyone's view of the evidence. Further, without making any check with other employees in the store, Folkman proceeded with plaintiff's arrest and called the police.

Our Utah statute absolves an employee from civil liability if reasonable and probable ground exists for believing the person arrested committed larceny of the goods. Folkman, by his own admission, had encountered similar situations where he had detained persons, and anyone in his position must certainly be familiar — and we think the statute implicitly so requires — with the basic requirements of establishing a criminal cause of action for larceny. How can reasonable minds believe that this store manager, with his knowledge of such situations, and having in effect falsely accused plaintiff of having the item concealed in his pockets, ever except to secure a criminal conviction under the circumstances?

Further, let us look at the surrounding circumstances existing at the time, and of which Folkman was certainly cognizant:

1. Plaintiff was shopping alone — not in a typical gang having lookouts and "shields";

2. There were practically no other shoppers in that section of the store at the time — a sharp contrast to crowded stores where "easy-picking" is more likely;

3. There were at least three store employees, in addition to Folkman, who had nothing better to do than to monitor plaintiff's movements — hardly a situation encouraging shoplifting;

4. Plaintiff had purchased one item, and still had approximately $7.00 cash in his possession to purchase the $2.00 karabiner had he so desired; and he could have also put the item on his family's charge account.

5. It would have been easy for defendants, with adequate personnel having little to do, to have resolved the entire matter by waiting until plaintiff might have proceeded out of the store, or onto the street, before detaining him (**R.** 107).

Reasonable minds would suggest that Folkman

would have certainly had a discussion with his other employees before railroading plaintiff into jail in view of the scant information he had and the mistake he made in first requiring plaintiff to empty his pockets. An annotation found at 47 A.L.R. 3rd 991 and following, clearly sets forth the rule that "reasonable grounds" and "probable cause" mean the same thing, and that the standard to be applied to one making an arrest of this type is the objective standard of "the reasonable prudent man", as contained in the referenced case of *Coblyn v. Kennedy's Inc.*, (Mass.) 268 NE 2d 860, 47 A.L.R. 3rd 991. It was pointed out that anything less than such an objective standard would invite intrusions upon constitutionally guaranteed rights, further noting that the objective standard applies to cases involving malicious prosecution and false arrest.

The annotation at 47 A.L.R. 3rd, page 1002, contains the following comments:

> "Some . . . courts have further held that under this rule, mere suspicion that a person is shoplifting is insufficient to create probable cause for detention under a shoplifting statute, . . ."

Further:

> "It is apparent, therefore, that it behooves the merchant to investigate the beliefs and suspicions of other parties before acting thereon, and indeed, the failure of the merchant to properly attempt to confirm or disprove his suspicions, or those of others, by reasonable investigation, has

been held in several cases to be a significant factor in determining the existence or non-existence of probable cause."

At page 1008 a sub-topic considers the necessity of conducting reasonable investigation before detaining a suspected shoplifter:

> "The issue of whether or not the detaining person conducted a reasonable investigation to confirm his suspicions or beliefs before arresting the suspect has, in some situations, been considered relevant in determining whether the detention was based upon probable cause. Failure to conduct such inquiry has been considered an important factor in determining that insufficient cause existed for detaining a suspected shoplifter . . ."

At page 1019 of the annotation the situation confronting Folkman at this point is stated concisely:

> ". . . that once the goods have been recovered the next step which the law contemplated on behalf of the shopkeeper was either to liberate the person apprehended under the statute or to call the police so that due process could begin. Thus, by detaining the customer beyond this point, the store lost its privilege under the statute, . . ."

The annotation beginning at 47 A.L.R. 3rd 991 contains many references to factual situations involving variations of shoplifting problems, and this Court can excerpt any further pertinent provisions contained in the annotation which may lend help to a decision of this case.

Since defendant Folkman at no time made contact with other store employees other than to receive a phone call from Bringhurst and to check with another employee upon reaching the floor of the store as to which person was being watched, the Mississippi case of *J. C. Penney Co. v. Cox* (1963), 246 Miss. 1, 148 So. 2d 679 would be quite appropriate. In that case it was held that probable cause for the detention of a suspected shoplifter had not been established where the detaining person acted only upon the fact that someone in the store had told one of the clerks that he believed the suspect had stolen something, the clerk then relaying the accusation to the assistant manager of the store, who carried out the detention. The court flatly stated that probable cause cannot be based upon mere belief of a third person that somebody did or did not do something.

Let us next examine the evidence to ascertain whether reasonable and probable ground for arrest would have existed had Folkman in fact checked with his employees. The employee first giving the "210 alert" was Charlie Spicer, who observed plaintiff examining the karabiner prior to making the waterbag purchase, and who stated (**R. 70**) that, ". . . as I watched, he put the karabiner under his shirt." Spicer then, on cross examination (**R. 74**), stated that plaintiff "rolled his shirt like this (indicating)." He further stated that (**R. 75, 76**), ". . . he took this and rolled up his shirt and stuck it underneath."

Had Folkman called Spicer to the scene, and had he looked at plaintiff and observed that his levi's had no belt (R. 114) and that the T-type shirt was untucked and hanging over (R. 115 — and see Exhibit 3-P), it would have hardly supported Folkman's later observation at trial (R. 109) that Spicer ". . . didn't say it quite right," and that what "We meant by tucked under his shirt . . . was tucked in his pants with his shirt covering the pants."

If we next go to Richard Bringhurst, Folkman would have received another conflicting story since he testified that, subsequent to the time Spicer allegedly saw the plaintiff tuck the karabiner under his shirt, the plaintiff, while holding the helmet in his arm at rib-cage height (R. 85, 86), lifted the end of the envelopes in his helmet and put the karabiner under them. He stated that he previously saw the plaintiff with the karabiner in his hand (R. 86).

In answer to a question inquiring as to whether such an obvious attempt to conceal an item by holding the helmet up for view and visibly revealing the item to be tucked under the envelopes was unusual, contrasted to the slight-of-hand movement that one would normally expect of someone secreting such an object, Bringhurst did allow (R. 91) that he would admit that ". . . Kent was pretty careless."

It is submitted that had Folkman checked Spicer's absolutely conflicting story of the taking of the kara-

biner with that of Bringhurst, coupled with his own still different version that it was in one of plaintiff's pockets, any reasonable prudent man, utilizing an objective standard and considering the other facts at his disposal, would have certainly realized that maintaining a criminal charge against plaintiff was completely out of the question.

Plaintiff submits that under our Utah statute and applicable law, coupled with the undisputed facts, defendants had no reasonable and probable ground for further detaining, arresting and incarcerating plaintiff as a matter of law.

II.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN REFUSING TO INSTRUCT THE JURY THAT THE BURDEN OF PROOF TO ESTABLISH REASONABLE AND PROBABLE CAUSE FOR PLAINTIFF'S DETENTION AND ARREST WAS UPON DEFENDANTS.

Defendant's Third Defense to plaintiff's Complaint (R. 215) affirmatively asserted that reasonable and probable grounds existed for detaining plaintiff, and that his detention was reasonable and lawful. In effect the defense set forth the same matter contained in the foregoing quoted statutory provisions. A de-

fense of this type, both under the statute and at common law, imposes the burden of proof upon the defendants to show reasonable and probable cause under an objective standard.

When the Instructions were being discussed for submission to the jury, plaintiff submitted the following instruction relating to burden of proof (R. 127):

> "You are instructed that whether or not the defendant had reasonable and probable grounds to believe that plaintiff had committed larceny at the time and place in question depends on whether a reasonable and prudent man in his position would be justified in believing facts which would warrant making the arrest. In order for the defendant to justify the arrest, you must find by a preponderance of the evidence that he had reasonable and probable grounds for believing that plaintiff has committed said offense. The burden of proof on all other propositions is on the plaintiff.

The court refused to give the foregoing Instruction or any other Instruction remotely suggesting that defendants had the burden of proving reasonable and probable cause for detaining and/or arresting plaintiff. In fact, an examination of Instructions 14 (false imprisonment), 15 (malicious prosecution) and 19 (false arrest) (R. 169, 170, 174). will reveal that those instructions were all negative in form, that they placed all burdens of proof on plaintiff, and that they left no room for any thought that the burden of proof in justification for

plaintiff's arrest and detention was on defendants. Instructions 8 and 9 (R. 164) were the general instructions given by the Court placing the burden of proof upon plaintiff.

If there is any question that the burden of proof was actually placed on plaintiff to establish that defendants did not have reasonable and probable ground for the arrest which was made, Instruction 19 resolves any such argument:

> "You are instructed that if you find from a preponderance of the evidence that at the time that the defendants arrested plaintiff, defendants did not have reasonable or probable grounds for believing that plaintiff had committed larceny, then you are instructed that defendants are responsible for making a false arrest. . . ." (R. 174)

Plaintiff took Exception (R. 127) to the refusal of the trial Court to give his requested instruction and extensively argued the matter in his Motion for New Trial (R. 145), which was denied.

The law is clear that the defense of reasonable and probable cause in the detention and/or arrest of a suspected shoplifter is upon the one asserting such defense. 32 Am. Jur 2nd, False Imprisonment, Section 7 at page 79, states the general proposition:

> "It is frequently held or recognized that the want of probable cause is not an essential element of the action for false imprisonment. It is also

sometimes stated that the presence of probable cause is not a defense to the action. Nevertheless, the question of probable cause becomes material in a false imprisonment case where the issue is justification for an arrest or detention without a warrant or where the defense is that the defendant was acting in protection of his person or property. The question also becomes material, as a mitigating factor, where punitive damages are sought.

"Where it is material, the question of probable cause is a mixed one of law and fact. The court submits the evidence of it to the jury with instructions as to what will amount to probable cause, if proved. If the facts are undisputed, the question is one of law to be determined by the court."

The same citation, paragraph 101 at page 150, deals with the matter of burden of proof in unequivocal language:

"The burden of proof is upon the defendant to justify the arrest or imprisonment by showing that i t was effected under lawful authority, including the existence of probable cause therefor, where probable cause is a factor."

The annotation at 47 A.L.R. 3rd at page 1004 states the basic rule applicable to false imprisonment actions (which include the same elements as false imprisonment and arrest):

"As is the case in false imprisonment action generally, the burden of proof is upon the plaintiff

to show that he was indeed detained against his will. The burden then shifts to the defendant to show that the detention was justified. If a merchant intends to rely on a statute which permits detention of suspected shoplifters, he must, of course, show that he comes within the purview of the statute, and then, according to the provisions contained therein, must show that his detention of the plaintiff was based upon probable cause, and that the detention was carried out in a reasonable manner and for a reasonable time."

The previously referenced case of *Isaiah v. Great Atlantic & Pacific Tea Company* also dealt with the matter of burden of proof in situations involving statutory provisions dealing with probable cause. There the court also held that a jury instruction which placed the burden of proof on the defendant to show that there was a probable cause for detention was not erroneous and that the burden was upon the defense to show that a state of facts existed which justified making an arrest.

This writer has found no case involving statutory provisions such as we have in Utah which departs from the principle that the burden of proving reasonable and probable cause for one's detention and/or arrest lies anywhere other than with the one making the detention and/or arrest. In this case the jury should have been so instructed because the real issue in the case involved justification since the facts surrounding the detention and arrest otherwise provided all of the elements constituting the cause of action. To refuse to instruct the jury that the burden of justification was on the defendants

effectively reversed the entire burden of proof situation. Nor was the matter assisted by the giving of Instructions 10, 11 and 12 which merely recited the statute and referred to the phrase "reasonable and probable ground" in general terms and without setting forth any standard of proof or that the proof was upon the defendants to establish the same. In any event, Instruction 19 sealed the matter against plaintiff.

Defendants may argue in their brief, as was done when argument was had on the Motion for New Trial, that the jury must have understood that the burden of proof to show justification for the detention and arrest was upon the defendants notwithstanding the failure of an instruction to cover the issue. But this argument is rather superficial in view of the consistent position throughout the instructions placing the burden of proof upon plaintiff. If the matter of burden of proof has no place in civil litigation, then the court should speak out on the matter and it should be removed from the list of stock instructions if juries are so finely tuned as to be aware of what the law is. But jurors are not lawyers, and the refusal of the court to place the burden of proof to show justification for the detention and arrest upon defendants was germane to the entire case and to the most critical issue before the jury. The fact that the jury returned a verdict of No Cause of Action can only be justified by a finding that justification existed for making the detention and arrest. Thus, the burden of proof was critical to the verdict.

In the actual trial of litigated cases, where trial lawyers must convince juries, the matter of burden of proof becomes very important. Without a proper instruction on the burden of proof the boundaries of argument to a jury are limited. It is one thing to argue the strength of one's own case and to point out that the burden of proof has been met, but in a case of this type the strength of one's argument can be much greater by pointing out to the jury, in accordance with the instructions, that the burden of proof to show justification for the detention and arrest is upon the defendants and that they have failed in critical particulars to sustain that burden. Lacking such an instruction the plaintiff must argue in much more general terms and must convince the jury by the total strength of his own case, burdened with the further problem of trying to make an argument which is negative in nature to offset what should have been the affirmative argument of the opposition.

SUMMARY

To affirm the type of conduct evidenced in this matter creates disturbing implications for the simple reason that any person in any retail establishment who is in the act of shopping, and who places an article in an open handbag, helmet or other receptacle, is subject to being detained, arrested and thrown into jail without realistic recourse against the offender. This sobering realization reaches each of us since, at some time in everyone's shopping experience and under almost identi-

cal facts, any of us could have been thrown into jail. Under the facts present in this situation the failure of a court to direct a verdict as a matter of law or, worse still, to fail to unequixocally instruct the jury that the burden of proof in justification of the detention and arrest was upon the defendants, constitutes a clear denial of due process of law as guaranteed by the 14th Amendment to the U. S. Constitution.

The argument which the defendants will probably raise again — as it was raised during the trial, claiming that plaintiff did not strenuously object to his initial detention, either by physical remonstrance or by what would have been wasted talk, further illustrates the high-handed nature of this occurrence. Perhaps, if plaintiff had been skilled in the art of shoplifting he would have had ready answers to furnish at the time of his detention; on the other hand, had he been a skilled shoplifter and somewhat knowledgeable in the ways of the law, he would have certainly said nothing and stood on his legal rights. But to suggest some standard of conduct to an 18-year-old minor to follow after his detention which might satisfy some hindsight test peculiar to the whims of defendants is ridiculous. Plaintiff had never been arrested in his life or charged with any activity of this type, he was gainfully employed and was a student at the University of Utah, and — we can assume, properly taught to respect the property of others. The shock, humiliation, and bewilderment of being detained, arrested, frisked, handcuffed, and taken

through the streets and placed in jail, with all of its attendant unpleasant effects, is an experience which hardly promotes rational thought or action — particularly as to an 18-year old minor. Not only does such conduct violate due process of law under the 14th Amendment, it constitutes a clear violation of plaintiff's rights under the Civil Rights Act (Title 42, Sec. 1983, U.S.C.A.):

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Perhaps if one wishes to judge this case by holding that reasonable and probable cause for detaining and arresting one in the act of shopping exists simply because the shopper happens to have a motorcycle helmet in his hand, then it might be possible to justify defendants' actions, Hopefully, however, justice has come to the point where such tests are no longer valid — and no such test should be applied to this case. Mere suspicion has no place in the law.

CONCLUSION

It is respectfully submitted that this Court should

hold, as a matter of law, that no reasonable and probable cause existed for the detention and arrest of plaintiff in this matter and that, as to all other issues, the case should be remanded for a new trial.

Respectfully submitted,

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